

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

RAVENSWOOD CITY SCHOOL DISTRICT,

Case No: C 10-03950 SBA

ORDER

Plaintiff,

vs.

J.S., a minor, et al.,

Defendants.

Plaintiff Ravenswood City School District (“the District”) seeks judicial review of an adverse decision rendered by Administrative Law Judge Rebecca P. Freie (“the ALJ”) of the California Office of Administrative Hearings (“OAH”) following a twelve-day due process hearing conducted pursuant to the Individual with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1415(i)(2)(A). In particular, the District objects to the ALJ’s ruling in favor of the minor student, J.S., which requires the District to pay for his special education at Stellar Academy and for 600 hours of tutoring.

The parties are presently before the court on the District's Motion for Summary Judgment. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES the District's motion for summary judgment and AFFIRMS the ALJ's decision. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

1 **I. BACKGROUND**

2 **A. OVERVIEW OF THE IDEA**

3 The IDEA was enacted “to ensure that all children with disabilities have available to
 4 them a free appropriate public education that emphasizes special education and related
 5 services designed to meet their unique needs and prepare them for employment and
 6 independent living.” 20 U.S.C. § 1400(d)(1)(A). Under Part B of the IDEA, a state must
 7 provide disabled children between the ages of three and twenty-one with special education
 8 and related services under an Individualized Education Program (“IEP”). 20 U.S.C.
 9 § 1412(a)(1)(A), (a)(4). An IEP is a written statement that is developed for each disabled
 10 child by an IEP team, typically consisting of the parents, a special education teacher, a
 11 representative of the local education agency, an expert, and, sometimes, the child. 20
 12 U.S.C. § 1414(d); Christopher v. Stanislaus Cnty. Office of Educ., 384 F.3d 1205, 1208 n.1
 13 (9th Cir. 2004).

14 Parents who are dissatisfied with an IEP may file a complaint triggering a meeting
 15 with the IEP team “where the parents of the child discuss their complaint” and the
 16 educational agency “is provided the opportunity to resolve the complaint” 20 U.S.C.
 17 § 1415(f)(1)(B)(i)(IV). If the complaint is not resolved “to the satisfaction of the parents
 18 within 30 days of the receipt of the complaint,” the parents may request a “due process
 19 hearing.” 20 U.S.C. § 1415(f)(1)(B)(ii). Following such a hearing, “[a]ny party aggrieved
 20 by the findings and decision ... shall have the right to bring a civil action with respect to the
 21 complaint presented pursuant to this section, which action may be brought in any State
 22 court of competent jurisdiction or in a district court of the United States.” 20 U.S.C.
 23 § 1415(i)(2)(A).

24 **B. FACTUAL SUMMARY**

25 **1. J.S.’s Learning Challenges**

26 Beginning the 2004-2005 school year, J.S. enrolled in kindergarten at the Edison-
 27 Brentwood Elementary School (“Brentwood”), a school which lies within the District.
 28 Administrative Decision (“AD”) 8. He has struggled academically and had to repeat the

1 first grade the following 2006-2007 school year. AD 9. J.S.’s mother (“Mother”)
2 frequently discussed her son’s learning difficulties with his first grade teacher. Id.

3 On February 5, 2007, the District convened a Student Success Team meeting
4 (“SST”) to address Mother’s concerns regarding J.S.’s academic issues. Id. The District’s
5 SST process involved setting up a meeting with J.S.’s parents and school personnel to
6 determine whether “interventions” were needed. Id. At the SST meeting, the team decided
7 that Mother was to obtain medical hearing and vision tests for J.S. because he had failed a
8 school nurse’s screenings in these areas. Id.

9 On March 21, 2007, the SST reconvened, and Mother requested that J.S. be referred
10 for special education assessment. Id. The team agreed to her request. Id. However, the
11 District did not provide Mother with a notice of procedural safeguards at this meeting, as
12 legally required. Id. It was the District’s practice not to provide this notice at SST
13 meetings, even if the parents requested a special assessment or the team recommended a
14 special assessment. Id.

15 The District’s method of developing a special education assessment plan for a
16 disabled student involved holding a meeting with the parents, the integrated services
17 teacher (“IST”) and specialists who would most likely be assessing the student for special
18 education. AD 9-10. Participants in the meeting are referred to as the Initial Assessment
19 Team (“IAT”). AD 10.

20 Consistent with its practice, the District assembled an IAT meeting which took place
21 on April 4, 2007. Id. At the meeting, Mother was incorrectly told that J.S. could not be
22 assessed until she provided the District with the results of the medical vision and hearing
23 tests she had been asked to procure at the February 5 SST meeting. Id. As a result, Mother
24 was left with the misimpression that the District could legally refuse to assess J.S. until she
25 provided the test results, and that she lacked grounds to contest such delay. AD 10-11.

26 Ultimately, Mother was not provided with an assessment plan until December 17,
27 2007, almost nine months after she initially requested an assessment on March 21, 2007.
28 AD 13. The District assessed J.S. for academic achievement in March 2008, but did not

1 have him assessed by a school psychologist until May 29, 2008 due to the District's lack of
2 school psychologists. AD 13-15. The District did not hold an IEP meeting until September
3 11, 2008, almost eighteen months after Mother's initial request for an assessment. AD 14.

4 Ms. Dena Edwy McManis, a psychologist with San Francisco Unified School
5 District ("SFUSD"), conducted J.S.'s May 29 psychological assessment. AD 15. Ms.
6 McManis reviewed J.S.'s school records and academic achievement tests, administered
7 various neuropsychological and behavioral assessment tools, and interviewed J.S., Mother,
8 and J.S.'s teacher. Id. The assessment showed scores that were consistently at a pre-school
9 or kindergarten level, even though J.S. had attended Brentwood as a regular student for four
10 years. AD 17. Ms. McManis reported that J.S. had "significant difficulty retrieving
11 phonological information from long term memory and executing a sequence of operations
12 quickly and repeatedly," and that his struggles "have a direct effect on reading fluency."
13 Id. She further noted that J.S. had attention issues and concluded that J.S. was cognitively
14 impaired. AD 15, 17.

15 **2. J.S.'s IEP**

16 The District convened an IEP meeting on September 11, 2008, at which time the IEP
17 team determined that J.S. was eligible for special education services under the category of
18 "specific learning disability." AD 15-16. The team did not apply the category "mental
19 retardation" because all of the team members who knew J.S. did not believe that he was
20 cognitively impaired. AD 16. Mother and J.S.'s father were provided with notices of
21 procedural safeguards and consented to J.S.'s IEP. AD 16-17.

22 The IEP included specific performance goals for J.S. based on his Present Levels of
23 Performance ("PLOP"). AD 1. Mr. Bernard Mojares, an IST at Brentwood, determined
24 J.S.'s PLOPs based on two or more classroom observations of J.S. and an informal
25 screening using the SteDell tool to determine which California grade levels J.S. had met.
26 AD 18. A student's IEP goals are listed on a standardized form that contains space in
27 which to indicate a student's current baseline performance level where PLOPs may be
28 addressed. Id.

1 The baseline information listed on J.S.’s 2008-2009 IEP did not indicate what grade
2 level SteDell tool was used or what the specific tool measured. Id. An addendum to the
3 IEP plan addressing J.S.’s math skills understated J.S.’s extremely low academic
4 achievement level established at Ms. McManis’s May 2008 assessment. AD 19.
5 Additionally, Mr. Mojares created J.S.’s IEP mistakenly believing that J.S. was cognitively
6 impaired; after the IEP team determined that J.S. was not cognitively impaired, Mr.
7 Mojares did not revise J.S.’s IEP. AD 15-16. The record shows that an IEP created for a
8 cognitively impaired student is inappropriate for a non-cognitively impaired student. AD
9 21.

10 J.S.’s 2008-2009 IEP listed four annual goals. Id. First, J.S. was to identify upper
11 and lower case letters of the alphabet, measured by the percentage of letters correctly
12 identified. Id. This goal did not set a baseline on how many letters J.S. could identify at
13 the beginning of the school year and did not ask him to identify the sounds associated with
14 each letter. Id. The goal also did not directly address J.S.’s lack of phonological
15 awareness. Id.

16 J.S.’s second goal was to respond to ask-and-answer questions when a story was
17 read out loud to him, asking and answering an increasing percentage of questions each
18 reporting period. Id. This goal did not assist J.S. with learning how to read, and contained
19 no baseline percentage, goal percentage, or criteria for the questions and answers. Id.

20 J.S.’s third goal was to determine a “reasonable” phonetic spelling of between 10 to
21 15 words. AD 20. This goal did not contain a baseline indication of which letters and
22 phonemes the student already knew nor which he would be expected to learn, and did not
23 address which words he was to spell. Id.

24 Finally, J.S. was to add and subtract numbers up to 10 with 40% accuracy in the first
25 reporting period, numbers up to 15 with 60% accuracy in the second period, and numbers
26 up to 20 with 80% accuracy in the final reporting period. Id. This goal did not link his
27 expected performance in each reporting period to his success or failure during the previous
28 term. Id. The goal did not address J.S.’s baseline math skills. Id.

1 **3. J.S.'s Progress**

2 For the 2008-2009 school year the District, which characterizes itself as being a “full
 3 inclusion” district that does not segregate disabled students, offered J.S. specialized
 4 instruction from an IST for 45 minutes, three times a week in group setting. Id. In
 5 November 2008, due to J.S. making “slight progress,” these services were increased to
 6 specialized group instruction with an IST for 45 minutes, five times per week and the
 7 assistance of an instructional aid for 120 minutes each day. Id. Mother disagreed with
 8 these placements because the services did not meet J.S.’s unique need to develop
 9 phonological awareness. AD 23. Although the school employed “reading specialists,” their
 10 services were only available to general education students, not to those with an IEP, and
 11 J.S. was not offered their services. AD 24.

12 Throughout the 2008-2009 school year, the District implemented J.S.’s IEP, but the
 13 evidence established that J.S. made little progress; J.S. was still unable to consistently
 14 recognize letters of the alphabet and their sounds or to add numbers beyond single digits
 15 even into the next school year. AD 24. As early as the beginning of the 2008 school year,
 16 J.S.’s reading deficiency required intensive small-group reading instruction. AD 23.

17 On September 9, 2009, Mr. Mojares conducted an informal evaluation of J.S. in
 18 advance of J.S.’s forthcoming IEP meeting. AD 28. On September 11, 2009, J.S.’s IEP
 19 team, including Mother and an advocate on her behalf, met for four and a half hours to
 20 discuss J.S.’s placement for the upcoming school year. AD 26. Mother received a notice
 21 of procedural safeguards during this meeting. AD 27. Although Mr. Mojares had provided
 22 the results of his informal assessment two days before, the IEP team had no adequate,
 23 formal data to establish J.S.’s current level of performance. AD 29. Mr. Mojares’s
 24 assessment of J.S.’s performance level directly conflicted with J.S.’s teacher’s testimony
 25 regarding J.S.’s skill levels at the time of this meeting. Id.

26 The September 11, 2009 IEP team discussed sending J.S. to one of the other
 27 elementary schools in the District, several of which were piloting a new program for
 28 struggling readers, called the Inside Program. AD 26. The team suggested that Mother visit

1 one or more classrooms using the program. Id. The team also discussed the possibility of
 2 placing J.S. in a classroom for students with disabilities operated by another school district
 3 (the District being full inclusion) or by the county office of education. AD 26-27. The
 4 team also discussed the possibility of tutoring at Sylvan learning center. Id. The team did
 5 not decide on nor offer a placement at this meeting and did not schedule a time to
 6 reconvene, even though the District had an obligation to make a placement offer to J.S. at
 7 this point. AD 27. The District offered to show Mother in-district alternative placements,
 8 but did not offer to show her out-of-district placements. Id. The evidence suggests that
 9 Mother did observe two Inside Program classrooms after this meeting. Id. The District
 10 offered also offered J.S. IST services for 45 minutes and an instructional aid for 180
 11 minutes. AD 29.

12 At the September 11, 2009 IEP meeting, Mother had questions regarding J.S.'s
 13 academic abilities and the District offered to have Mr. Mojares conduct an educational
 14 assessment, but no forms for an assessment plan were available at the IEP meeting. Id.
 15 Mr. Morjares testified that he sent the appropriate forms to Mother's home twice, but that
 16 Mother never returned the forms to him. Id. The District took no further steps to assess
 17 J.S., but did pay Ms. Noll to conduct an independent assessment during November 2009-
 18 December 2009. Id. The assessment's results were available to Mother prior to J.S.'s next
 19 IEP meeting on February 3, 2010. Id.

20 At some point between September 11, 2009 and February 3, 2010 J.S.'s IEP plan
 21 was modified to include much more explicit details of J.S.'s PLOPs and goals. AD 28. The
 22 modified IEP contained sufficiently detailed and understandable baselines upon which to
 23 base J.S.'s goals for the school year. Id.

24 At a February 3, 2010 IEP meeting, J.S.'s IEP team reviewed the results of Ms.
 25 Noll's assessment as well as a report from a Lindamood Bell Center. Id. Mother was given
 26 a notice of procedural safeguards. Id. At the meeting, J.S.'s attorney suggested that J.S. be
 27 offered six hours a day of reading instruction at a Lindamood Bell Learning Center. Id.
 28 The team discussed this alternative and also reopened discussion of placing student in a

1 general education classroom using the Inside Program curriculum. Id. The IEP team
2 developed goals at this meeting that addressed some of J.S.'s individualized needs and
3 contained measurable objectives. AD 28. During this meeting, the District offered J.S. IST
4 services for 45 minutes each day, instructional aide services for 240 minutes per day, and
5 two 30-minutes session with a speech and language therapist in a group setting. AD 29.
6 These services were fully implemented, with Mother's consent, but did not specifically
7 address J.S.'s need to develop phonological awareness.

8 At the February 3, 2010 IEP meeting, the District also offered J.S. placement in a
9 general education classroom at the Green Oaks School, an in-district elementary school that
10 was using the Inside Program. Id. Mother observed this classroom sometime after the
11 February 9, 2009 IEP meeting. Id. Mother agreed to the increased service levels but did
12 not consent to have J.S. placed in the Green Oaks classroom. Id. The Inside Program at
13 Green Oaks was too advanced for J.S. Id. Mr. Charles Roberson, the teacher of the Green
14 Oaks class using the Inside Program, testified that the program was much less effective for
15 students below a second grade reading level. AD 30. At the time of his due process
16 hearing, J.S. was functioning at a kindergarten reading level, and his lack of phonemic
17 awareness was the primary barrier to his advancement in reading. Id. The Inside Program
18 addresses phonemic awareness only briefly at the beginning of the course, and was
19 insufficient to help J.S. develop his phonemic awareness Id.

20 J.S. needed reading intensive instruction in a small group setting in a system that is
21 explicit, systematic, and intensive. AD 29. J.S. required repetition and simultaneous
22 kinesthetic and multisensory instruction. Id. Even with the extensive modifications offered
23 by the District and other modifications made by J.S.'s teachers, placement in a general
24 education classroom was inappropriate for J.S. AD 29. Placement in Slingerland, Orton
25 Gillingham, and certain Lindamood Bell or other similar programs would best address
26 J.S.'s needs. AD 31. The Stellar Academy is one such program. AD 34.

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28

1 **C. PROCEDURAL HISTORY**

2 On February 28, 2010, J.S. filed a request with the OAH for a due process hearing
3 regarding the District's alleged failure to provide him with a Free and Appropriate
4 Education ("FAPE") since his enrollment in the District. Compl. ¶ 38. The District also
5 requested a hearing on whether the placement and services offered in the February 3, 2010
6 IEP constitute a FAPE. The due process hearing took place before the ALJ on May 17-20,
7 24-27, June 3-4 and 7-9, 2010. AD 1.

8 On August 20, 2010, the ALJ issued a forty-seven page Administrative Decision,
9 consisting of 126 paragraphs of factual findings and 44 legal conclusions, in which she
10 found that the District had failed to provide J.S. with a FAPE, as required by the IDEA, for
11 the 2007-2008, 2008-2009 and 2009-2010 school years, and that J.S. had suffered
12 academically as a result. AD 39-45. Accordingly, the ALJ ordered the District to pay
13 tuition, fees and transportation costs for J.S. to attend Stellar Academy for the next three
14 years as compensatory education, including summer programs. AD 47. In addition, she
15 ordered the District to pay for 600 hours of tutoring, also as compensatory education. Id.

16 On September 2, 2010, the District filed the instant action against J.S., the OAH,
17 Jack O'Connell in his capacity as California State Superintendent of Public Instruction, and
18 the California Department of Education. Pursuant to the IDEA, the District seeks the
19 review and reversal of the ALJ's Administrative Decision requiring the District to pay for
20 J.S.'s tuition at Stellar Academy and to pay for his tutoring.

21 Shortly after filing its Complaint, the District filed a motion for preliminary
22 injunction to stay enforcement of the Administrative Decision. J.S. has filed an opposition
23 to the motion and a request for leave to file a cross-motion for a "stay put" order to
24 maintain his placement at Stellar Academy and to otherwise compel the District to comply
25 with the Administrative Decision. On November 18, 2010, the Court issued an Order
26 denying the District's motion for preliminary injunction and granting J.S.'s motion for a
27 stay put order. Dkt. 66.

28

1 The District has now filed a motion for summary judgment. The motion is fully
 2 briefed and is ripe for adjudication.

3 **II. LEGAL STANDARD**

4 Though not a “true motion for summary judgment, the appeal of an IDEA-based due
 5 process hearing decision is properly styled and presented by the parties in a summary
 6 judgment format.” Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9th Cir.
 7 1995). “When a party challenges the outcome of an IDEA due process hearing, the
 8 reviewing court receives the administrative record, hears any additional evidence, and
 9 ‘bas[es] its decision on the preponderance of the evidence.’” R.B. v. Napa Valley Unified
 10 Sch. Dist., 496 F.3d 932, 937 (9th Cir. 2007) (quoting 20 U.S.C. § 1415(i)(2)(B)). Based
 11 on this standard, “complete de novo review of the administrative proceeding is
 12 inappropriate.” Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 817 (9th Cir. 2007). The
 13 party seeking relief in this Court bears the burden of demonstrating that the ALJ’s decision
 14 should be reversed. Clyde K. v. Pullayup Sch. Dist., No. 3, 35 F.3d 1396, 1399 (9th Cir.
 15 1994). In addition, the party challenging the administrative decision bears the burden of
 16 persuasion on each claim challenged. Id.

17 The statutory requirement “that a reviewing court base its decision on the
 18 ‘preponderance of the evidence’ is by no means an invitation to the courts to substitute their
 19 own notions of sound educational policy for those of the school authorities which they
 20 review.” Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). Rather, “due weight” must be
 21 given to the findings in the administrative proceedings. Id. The amount of deference to be
 22 afforded is a matter of discretion for the court. See Capistrano, 59 F.3d at 891. “When
 23 exercising its discretion to determine what weight to give the hearing officer’s findings,”
 24 the court may “examine the thoroughness of those findings” and accord greater deference
 25 when they are “‘thorough and careful.’” Id. (quoting Union Sch. Dist. v. Smith, 15 F.3d
 26 1519, 1524 (9th Cir. 1994)). The court “is free to accept or reject the findings [of the ALJ]
 27 in part or in whole.” Id. (internal quotations omitted).

28

Under the IDEA, deference is appropriate where an ALJ has carefully and thoroughly attended to the proceedings. See JG v. Douglas Cnty. Sch. Dist., 552 F.3d 786, 793 (9th Cir. 2008). The ALJ's written decision as well as the record of the hearing demonstrate that she was highly attentive, diligent and careful. The ALJ held a twelve-day administrative hearing in which she actively participated and engaged with witnesses and was responsive to the parties' evidentiary concerns. The ALJ issued a detailed forty-seven page well-reasoned decision that contains 126 factual conclusions and 44 legal conclusions. The opinion discusses the qualifications of the witnesses on whom she chose to rely, and carefully addresses the procedural and substantive issues surrounding whether J.S. received a FAPE. In addition, her decision was demonstrably balanced, as the ALJ found in favor of the District on numerous issues. Thus, the Court finds that the ALJ's findings are entitled to substantial deference.

II. DISCUSSION

A. AUTHORITY TO REIMBURSE J.S.

The District contends, as a threshold matter, that the ALJ had no authority to place J.S. in a non-certified, private school. See Pl.'s Mot. at 4-5. However, the ALJ did not order J.S. placed at Stellar Academy. Rather, she directed the District to reimburse J.S. "*as compensatory education* for the District's failure to provide [him] with a free appropriate education for the 2007-2008, 2008-2009 and 2009-2010 school years. AR 3543 (emphasis added). The ALJ's order was within the scope of her authority. See Forest Grove Sch. Dist. v. T.A., 129 S.Ct. 2484, 2493, 2496 (2009) (holding that parents may send their child to a private program and seek retroactive tuition reimbursement from the state); Michael P. v. Dep't of Educ., 656 F.3d 1057, 1069 (9th Cir. 2011) ("We may award reimbursement for private school placement if a school district unreasonably finds a child with disabilities ineligible for services under IDEA and the private school placement is appropriate."). This authority extends to reimbursements for private schools that do not meet state standards. Florence Cty. Sch. Dist. v. Carter, 510 U.S 7, 14 (1993) (rejecting contention "that reimbursement is necessarily barred by a private school's failure to meet state education

1 standards.”). See Florence Cty. Sch. Dist., 510 U.S at 14 (““it hardly seems consistent with
 2 the Act’s goals to forbid parents from educating their child at a school that provides an
 3 appropriate education simply because that school lacks the stamp of approval of the same
 4 public school system that failed to meet the child’s needs in the first place.””); see also
 5 Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478, 490 (4th Cir. 2011)
 6 Thus, the Court rejects the District’s contention that the ALJ exceeded her authority in
 7 ordering the District to reimburse Mother for J.S.’s tuition at Stellar Academy.

8 **B. STATUTE OF LIMITATIONS**

9 The statute of limitations for due process complaints in California precludes claims
 10 that accrued more than two years prior to the date of filing the request for a due process
 11 hearing. Cal. Edu.Code § 56505(l) (A due process hearing “shall be filed within two years
 12 from the date the party initiating the request knew or had reason to know of the facts
 13 underlying the basis for the request”); 20 U.S.C. § 1415(f)(3)(C) (same). The IDEA, in 20
 14 U.S.C. § 1415(f)(3)(D), and California Education Code § 56505, establish exceptions to the
 15 statute of limitations if (1) the parent was prevented from filing a request for due process
 16 hearing due to specific misrepresentations by the district that it had resolved the underlying
 17 problem addressed by the due process complaint, or (2) where the district withheld
 18 information from the parent that was required to be provided to the parent. Here, the ALJ
 19 ruled that the limitations period should be extended to claims dating back to March 21,
 20 2007 based on the District’s failure to provide Mother with the requisite notice of
 21 procedural rights at the SST meeting held on that date. AD 36. She also found that an
 22 extension of the statute of limitations was warranted based on the District’s
 23 misrepresentation to Mother at the April 4, 2007 meeting that it could not test J.S. until she
 24 provided the results of J.S. hearing and vision tests. AD 10, 36.

25 The District argues that the ALJ erred in applying this exception on the ground that
 26 its representation was not erroneous and that it did not otherwise prevent Mother from
 27 filing for a due process hearing. See Pl.’s Mot. at 5-7. The District’s contentions are
 28 misplaced. The law is clear that a parent’s failure or refusal to provide the results of

1 external testing does not relieve a school district of its duty to assess a student. See Union
 2 Sch. Dist., 15 F.3d at 1524 (parents' failure to produce a full doctor's report concerning
 3 their child did not excuse the school district's failure to assess child and to obtain
 4 evaluations for itself). Notably, the District knew or had reason to know that its statement
 5 to Mother was erroneous given the fact that it had previously litigated and lost the same
 6 argument; to wit, that it had no duty to provide vision and hearing tests as part of the
 7 assessment process. See Def.'s Opp'n, Ex. E (Ravenswood City School District, 102 LRP
 8 3422 (SEHO 200) at 8). Thus, the District's representation that it could not test J.S. until
 9 Mother obtained hearing and vision tests for him was clearly a misstatement.

10 Equally misplaced is the District's assertion that there was no showing that its
 11 misrepresentation interfered with Mother's ability to assert her due process rights. Pl.'s
 12 Mot. at 7. The ALJ determined that the District's misrepresentation misled Mother into
 13 believing that she had no grounds upon which to contest the delay and, therefore, denied
 14 Mother the opportunity for a due process hearing. AD 10-11. As the District has made no
 15 showing to the contrary, the Court defers to the ALJ's assessment of the factual issues and
 16 Mother's credibility on this point and concludes that the misrepresentation did interfere
 17 with Mother's ability to assert her due process hearing rights. Id.

18 The District next contends that the ALJ erred in extending the limitations period
 19 based on its failure to provide Mother with the notice of procedural safeguards at the SST
 20 meeting. Specifically, the District claims that this conclusion was in error because J.S. did
 21 not raise this argument in his request for a due process hearing. Pl.'s Mot. at 7. However,
 22 J.S. specifically preserved this claim in his complaint. AR 2813-14. The District waived
 23 the right to challenge the specificity of J.S.'s claims when it declined to file a Notice of
 24 Insufficiency. See 20 U.S.C. § 1415(c)(2)(A). Further, the ALJ held that any pleading
 25 deficiencies were harmless and caused by the District's failure to comply with J.S.'s
 26 numerous pre-hearing records requests. AR 669, 2736, 3431. Given these circumstances,
 27 the Court finds that the District has failed to demonstrate that the ALJ erred in extending
 28

1 the statute of limitations based on the District's admitted failure to provide Mother with the
 2 notice of procedural safeguards as well as its misrepresentation.

3 **C. LEAST RESTRICTIVE ENVIRONMENT**

4 The District argues that the ALJ failed to give due consideration to the requirement
 5 that a student's placement must be in the "least restrictive environment" possible. Pl.'s
 6 Mot. at 7-8. The IDEA requires that school districts offer placements in the "least
 7 restrictive environment" available to meet a student's unique needs. See 20 U.S.C.
 8 § 1412(a)(5)(A). This requirement is commonly referred to as "mainstreaming." See
 9 Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994)
 10 (adopting multi-factor test to determine appropriate level of "mainstreaming"). A student
 11 should thus not be removed from a general education classroom unless the severity of the
 12 student's disabilities is such that education in a general education classroom, even with
 13 supplementary materials and instructional aides, is insufficient to meet the student's needs.
 14 See 20 U.S.C. § 1412(a)(5)(A).

15 According to the District, a private school placement should only be made when a
 16 student's disability is such that the student cannot be satisfactorily educated in any public
 17 school setting. Id. at 8. The District is mixing apples with oranges. The mainstreaming
 18 requirement of the IDEA is to ensure that disabled children are placed "to the maximum
 19 extent appropriate ... with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A).
 20 There is nothing in the record showing that Star Academy is exclusively for disabled
 21 students. As such, the least restrictive environment requirement of the IDEA is not
 22 germane to the ALJ's decision.

23 **D. FAPE**

24 The IDEA imposes upon school districts the obligation to provide each student with
 25 a FAPE. Rowley, 458 U.S. at 206-07. To provide a FAPE, an IEP must meet the student's
 26 needs and be reasonably calculated to provide the student with a "meaningful" benefit.
 27 Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999). "A district court shall accord more
 28 deference to administrative agency findings that it considers 'thorough and careful.'" L.M.

1 v. Capistrano Unified Sch. Dist., 556 F.3d 900, 908 (9th Cir. 2009). Here, the ALJ found
2 that the District failed to provide J.S. with a FAPE for the 2008-2009 and 2009-2010 school
3 years based, inter alia, on the District's refusal to assess J.S. and failure to offer J.S.
4 services that would afford him a meaningful educational benefit. AD 12-14, 37-46.

5 The District contends that the ALJ's findings and conclusions regarding its failure to
6 provide a FAPE are erroneous. Pl.'s Mot. at 9-20. The starting point for addressing the
7 District's argument entails a determination of the level of deference the Court should afford
8 to the ALJ's findings regarding the District's failure to provide a FAPE. The record shows
9 that the ALJ considered the extensive testimony and evidence presented, and carefully
10 weighed the procedural and substantive issues germane to whether the District provided a
11 FAPE for each school year in question. In light of the "thorough and careful" consideration
12 of the record in reaching her conclusions, the Court exercises its discretion and finds that
13 the ALJ's findings and conclusions are entitled to deference. L.M., F.3d at 908.

14 **1. 2008-2009**

15 With regard to the 2008-2009 school year, the ALJ found that J.S.'s 2008-2009 IEP
16 was inadequate because the plan and its goals were not predicated upon clear baselines or
17 PLOPs. AD 14-16, 18. She found that because of the deficient PLOPs, the IEP's goals
18 were not based upon reasoned criteria or J.S.'s current skill levels. AD 19-20.
19 Additionally, the IEP's goals failed to meet J.S.'s need for phonemic awareness, failed to
20 provide measurable standards for success, and in one instance, failed to use the prior term's
21 achievements to set the next term's goals. AD 19-20. Even worse, the IEP was drafted
22 based on the mistaken belief that J.S. was cognitively impaired; yet, even when the IEP
23 team realized that he was not cognitively impaired but instead suffered from specific
24 learning disabilities, J.S.'s plan was not modified. AD 15. The ALJ considered testimony
25 regarding the import of PLOPs in determining an IEP plan's goals and proposed services.
26 AD 15. The ALJ also heard testimony that goals designed for a cognitively-impaired child
27 would not be entirely transferrable to a child lacking such impairment. AD 20-21.

28

1 The District argues that the lack of baselines is not a violation because baselines are
 2 not a mandatory component of an IEP. Pl.’s Mot. at 19-20. The Court is not persuaded.
 3 “An IEP begins by measuring the student’s present level of performance—affectionately
 4 known as PLOP—which provides a benchmark for measuring the student’s progress
 5 toward the goals stated in the IEP.” Settlegoode v. Portland Pub. Schs., 371 F.3d 503, 508
 6 n.1 (9th Cir. 2004). Baseline data must be concise and clearly understandable so that the
 7 student’s progress can be evaluated. See O’Toole v. Olathe Unified Sch. Dist., 144 F.3d
 8 692, 702-703 (10th Cir. 1998). The District’s contention that the existence of observational
 9 and other data obviates the need for baselines is unconvincing. Mr. Mojares, despite
 10 reviewing a variety of reports to draft the goals, could not identify J.S.’s abilities
 11 throughout the measurement period. AR 1787. In addition, as the ALJ found, the
 12 purported baselines were wholly insufficient. For instance, the May 2008
 13 psychoeducational evaluation “did not provide any indication of what, if any, skills the
 14 Student had in the area of mathematics”; the spelling goal “was too vague to determine
 15 what area of need it addressed, the objectives for each reporting period were too vague to
 16 be meaningful”; and the reading goals did not address phonemic awareness or “information
 17 as to what questions he was expected to ask or answer.” AR 3441-42, 3686-692, 2251.
 18 The IPE’s goals simply were substantively inadequate. Accordingly, based on the record
 19 presented, the Court finds that the ALJ had a proper basis upon which to find that the
 20 District denied J.S. a FAPE for the 2008-2009 school year.

21 **2. 2009-2010**

22 At the IEP meeting held on September 11, 2009, the District offered J.S. the services
 23 of an IST for 45 minutes, 5 times per week, and 180 minutes of instructional aid services
 24 each day. AD 29. On February 3, 2010, the District conducted another IEP meeting at
 25 which it offered IST services for 45 minutes each day, 5 days a week, 240 minutes per day
 26 of instructional aide services, placement in a general education program using the Inside
 27 Program and later added speech and language therapy sessions. Id. Mother observed the
 28 Inside Program classroom and opted against it, though she agreed to the additional

1 classroom services. *Id.* The ALJ found that the Inside Program was too advanced for J.S.,
 2 and would not be effective for him. AD 29-31. Ultimately, the ALJ concluded that “the
 3 IEP as written and implemented did not meet Student’s needs, and provide him with
 4 meaningful education benefit and a FAPE.” AD 31.

5 The District contends that the Inside Program is effective and points out that during
 6 the due process hearing it presented supporting testimony from several witnesses involved
 7 with the program. Pl.’s Mot. at 9-15. What the District fails to acknowledge, however, is
 8 that the ALJ made extensive credibility determinations about the District’s witnesses, and
 9 considered their testimony about the Inside Program curriculum in detail. The District
 10 attempts to argue that it was legal error to rely on J.S.’s witnesses in making findings about
 11 the Inside Program, even though the ALJ determined that J.S.’s witnesses were more
 12 credible than the District’s on that issue. The ALJ discussed in detail her reasons for
 13 according the testimony of Ms. Galloway, Ms. Taber and Ms. Noll great weight. AR 3446,
 14 3447, 3454. She also found Mother to be highly credible. AR 3431, 963, 1272. In
 15 addition, the ALJ provided an in-depth discussion regarding J.S.’s needs and whether they
 16 would be met by the Inside Program. Given her thorough and careful consideration of the
 17 testimony and evidence presented, the Court defers to the ALJ’s conclusions on this issue.
 18 In sum, based on the record presented, the Court finds that the ALJ had a proper basis upon
 19 which to find that the District denied J.S. a FAPE for the 2009-2010 school year.¹

20 **III. CONCLUSION**

21 For the reasons set forth above,

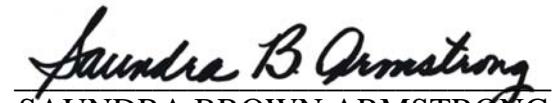
22 **IT IS HEREBY ORDERED THAT** the District’s motion for summary judgment is
 23 **DENIED**, and the Administrative Decision of the ALJ is **AFFIRMED**. Judgment shall be
 24

25
 26 ¹ The District also asserts that J.S.’s lack of progress was attributable to Mother’s
 27 failure to address J.S.’s undiagnosed Attention Deficit Disorder (“ADD”) and that the ALJ
 28 failed to take this into account. Pl.’s Mot. at 20-24. However, Mother’s refusal to have J.S.
 tested for ADD does not relieve the District of its duty to assess J.S.’s academic ability,
 develop an adequate IEP, and provide a FAPE. See Union Sch. Dist., 15 F. 3d at 1524.

1 entered in favor of Defendant J.S. The Clerk shall close the file and terminate any pending
2 matters.

3 IT IS SO ORDERED.

4 Dated: March 30, 2012


5 SAUNDRA BROWN ARMSTRONG
United States District Judge

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